IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 60 of 1998

in

FIRST APPEAL No 1523 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VASANTIBEN D/O AMARTLAL CHELDAS

Versus

AMBALAL CHELDAS GHANCHI

Appearance:

MR DK ACHARYA for Appellant

MS KUSUM M SHAH for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE A.M.KAPADIA

Date of decision: 20/04/2000

ORAL JUDGEMENT

(Per : Panchal, J.)

This appeal which is filed under Clause 15 of the Letters Patent is directed against judgment and decree dated December 15, 1997 passed by the learned Single Judge in First Appeal No. 1523/97, by which order dated April 22, 1997 passed by the learned Civil Judge (S.D.), Palanpur below Exh.1 in Special Execution Application No.7/92 directing the execution proceedings to proceed further, against the appellant, is confirmed.

2. Deceased Cheldas Bhikhabhai, a resident of village Rajpur, Taluka : Deesa, District : Banaskantha had inherited following amongst other ancestral properties :-

(1) House property bearing municipal no.619 situated in Rajpur, Deesa.
(2) House property bearing municipal no. 685 situated in Rajpur,Deesa.
(3) House property bearing municiapl no. 684 situated in Rajpur, Deesa.
(4) House property bearing municipal nos.679 & 680 situated in Rajpur, Deesa.
(5) House property bearing municipal no.682 situated in Rajpur, Deesa.
(6) House property bearing municipal nos.113 & 114 situated in Rajpur, Deesa.
(7) Godown bearing Gram Panchayat No.4/5 situated in village Sherganj.

Name of wife of Cheldas was Kashiben. Cheldas had a son named Amratlal, who died on February 29, 1948 and three daughters i.e. Narmadaben, Manguben and Hiraben. After death of Amratlal, there was no male member in the family and as Cheldas as well as his wife Kashiben were fairly old, Cheldas adopted present respondent Ambalal who was son of his brother as his son on April 14, 1950. After adoption, Cheldas expired intestate on May 2, 1950. It may be stated that Amratlal who was son of deceased Cheldas, was married to Kantaben and at the time of Amratlal's death, Kantaben was pregnant and gave birth to a daughter Vasantiben by name, who is appellant in the present appeal. Kashiben, widow of Cheldas Bhikhabhai died intestate on January 27, 1957; whereas Kantaben who was widow of deceased Amratlal expired on July 22, 1992. After the death of Cheldas,

Kashiben was in possession of properties of Cheldas and after her death, Kantaben came in possession of those properties. The present respondent filed Special Civil Suit No.4/62 in the Court of learned Civil Judge (S.D.) at Palanpur claiming to be entitled to possession of seven properties left by deceased Cheldas, which were mentioned in detail in the plaint, from Kantaben, on the ground that he was the absolute owner thereof. He also prayed to direct Kantaben to render accounts in respect of profits obtained and expenses incurred by her with regard to those properties. The suit was contested by Kantaben. On appreciation of evidence led by the parties, the Trial Court concluded that the respondent had successfully established his case with regard to his legal and valid adoption as well as with regard to his legal title to the disputed properties. The Trial Court, therefore, decreed the suit for possession and accounts by judgment dated August 31, 1963.

3. Feeling aggrieved by the said decree, Kantaben preferred First Appeal No. 417/93 in the High Court. On appreciation of evidence, the High Court held that adoption of the respondent by deceased Cheldas was valid in law. The High Court deduced that seven houses which were the properties in dispute, were not self-acquired properties of Cheldas, but were ancestral properties in his hands. The High Court found that by an arrangement which was entered into between Cheldas and the real mother of the respondent it was agreed that Cheldas was to enjoy all his properties absolutely during his life time and after his death; the respondent was to be the owner of his properties as his adopted son, but that agreement restricted the respondent's right in Cheldas's properties and that condition was neither legal nor valid. The High Court concluded that at the time of adoption of the respondent, deceased Cheldas as well as the respondent were co-parceners of the properties and as Cheldas died on May 2, 1950 and as on that date Hindu Women's Right to Properties Act, 1937 was made applicable, succession was governed by the provisions of Section 3(2) of the said Act and Kashiben, who was widow of Cheldas, was entitled to the same interest in the joint family properties as her husband had. According to the High Court, possession of the properties by Bai Kashi was not in pursuance of the adoption deed, but independent of it and in her own right and she had a widow's interest in the properties which were in her possession. The High Court, after considering the provisions of Hindu Women's Right to Properties Act, 1937 as well as section 14 of the Hindu Succession Act, 1955 held that her widow's interest was enlarged into full

ownership right and she was absolute owner of the properties which were in her possession. After holding that Kashiben had 1/2 interest in the joint family properties, she being widow of Cheldas, the High Court recorded a finding that other 1/2 belonged to the respondent, as he was the adopted son of Cheldas. The most important finding recorded by Division Bench of the High Court in appeal was that on the death of Bai Kashi, succession was governed by section 15 of the Hindu Succession Act, as she had died intestate and the respondent being one of the heirs of Bai Kashi, was entitled to 1/5th share in 1/2 share of Bai Kashi; whereas other heirs of Bai Kashi i.e. her three daughters and Vasantiben - daughter of deceased Amratlal (present appellant) were also entitled to 1/5th share in 1/2 share of Bai Kashi. The High Court, in view of the above-referred to findings, concluded that the respondent had failed to prove that he was the absolute owner of the properties. After concluding that the respondent was a co-parcener in the joint family properties, the Court held that Kantaben, who was widow of deceased Amratlal was entitled to right of maintenance and residence so far as joint family properties were concerned. The High Court also noted that Vasantiben i.e. the present appellant being the daughter of Amratlal, was also entitled to maintenance and marriage expenses out of the joint family properties. In view of the finding that the respondent was one of the co-parceners in the joint family properties, the High Court held that he having title to the suit properties, was entitled to file a suit for possession against Kantaben, who was not entitled to remain in possession of all the suit properties, except a right of maintenance and residence for herself and for her daughter. The High Court further found that there was no evidence on record to establish that the respondent had paid any amount to Kantaben or her daughter towards maintenance and, therefore, the respondent was not entitled to the accounts of joint family properties from Kantaben. Thus according to the High Court the decree of the Trial Court requiring Kantaben to render accounts was liable to be set aside. The High Court by decree dated December 21/22, 1970 confirmed the decree for possession, but set aside the decree for accounts passed against Kantaben. In order to appreciate the controversy between the parties, it would be necessary to notice relevant conclusions drawn by the Division Bench which disposed of First Appeal No. 417/63, which are as under :-

> "The agreement entered into between the parties that Cheldas was to be absolute owner of the

properties and the plaintiff was to be absolute owner of his properties and the plaintiff was to be the owner of his properties after his death evidently restricts the plaintiff's right in Cheldas's properties. No sooner the plaintiff was adopted he became a co-parcener with Cheldas and was entitled to rights in the said properties as a co-parcerne because the properties were ancestral. There is no evidence on the record in regard to any custom which would validate the aforesaid arrangement. The result is that the condition that Cheldas was to enjoy the properties during his life time absolutely as the owner and that the properties were to go to the plaintiff only on his death cannot be said to be legal and valid. The consequence is that at the time of the adoption of the plaintiff there was joint family of Cheldas and the plaintiff both being co-parceners therein Cheldas died in May 1950 and on that day the Hindu Woman's right to Properties Act, 1937 was made applicable and the succession, therefore, would be governed by the provisions of the said Act. When Cheldas died he had left his wife Bai Kashi. Bai Kashi under the provisions of Section 3(2) will be entitled to the same interest in the joint family properties as her husband had. There is no dispute that in the present case Bai Kashi remained in possession of the properties after the death of Cheldas. This possession of properties by Bai Kashi was not in pursuance of the adoption deed, but independently of it and in her own right. Bai Kashi died on January 27, 1957. Bai Kashi was possessed of the properties in her right as the widow of Cheldas. She had a widow's interest in the properties which she possessed. At the time when she died, Hindu Succession Act of 1955 had come into operation and under Section 14 of the said Act her widow's interest was enlarged into full ownership right. She was absolute owner of the properties in her possession. Thus she had half interest in the joint family properties,she being the widow of Cheldas. The other half belonged to the plaintiff as the adopted son of Cheldas. On the death of Bai Kashi, as she died intestate, the succession would be governed by section 15 of the Hindu Succession Act. The plaintiff is one of the heirs of Bai Kashi and would be entitled to 1/5th share in the half share of Bai Kashi. The other heirs of Bai Kashi being her three daughters and Vasanti,the

> daughter of Amrutlal. The plaintiff has thus failed to prove that he is the absolute and exclusive owner of the properties.The plaintiff is the co-parcener in the joint family properties. The properties being joint family properties and the defendant being the widow of Amrutlal is entitled to maintenance out of the joint family properties. She is also entitled to a right of residence in a joint family property. Bai Vasanti being the daughter of Amratlal is also entitled to maintenance and marriage expenses out the joint family properties. The plaintiff, therefore, has established that he has a title to the suit properties as a co-parcener. The plaintiff being entitled to the suit properties can file a suit for possession against a person who is not entitled to remain in possession of all the suit properties. The defendant had no right to remain in possession of properties except a right of maintenance and residence for herself and for her daughter (until she is married). There is no evidence on the record that the plaintiff had paid any amount to the defendant or her daughter towards maintenance. Therefore, the plaintiff is not entitled to an account of the joint family properties form the defendant. The decree of trial court requiring the defendant to render account is set aside and the decree for possession is confirmed with this direction that the defendant and her daughter have a right of maintenance and residence in joint family property. There shall be no order as to costs of this appeal."

4. As decree for possession in favour of the respondent was confirmed by the High Court, the respondent filed Special Execution Application No.3/73 for executing the decree of the Trial Court as modified by the High Court. In the said Darskhast, an adjustment of decree was entered into between the respondent and Kantaben on October 13, 1976. The adjustment was relating to suit properties, as Cheldas was in possession of other ancestral properties also, which were not subject matter of the suit. The adjustment referred to seven properties which were subject matter of the suit and recited that the respondent was in possession of the house bearing Municipal No.619; whereas Kantaben was in possession of Houses bearing Municipal numbers 615, 679, 680, 682 and 684 situated at Deesa. By the adjustment it was agreed that in order to maintain peace in the family,

decree should be adjusted. The free translation of the terms on which decree was adjusted is as under:-

"The properties bearing Deesa Municipal No.685 (described at Sr.No.2 above), Deesa municipal No.113 and 114 (described at Serial No.6 above) and godown bearing Kampur Gram Panchayat No. 4 5 described at serial no.7 above) are handed over to the decree holder by the judgment debtor and accordingly the judgment debtor has released the said properties from her right of maintenance and the possession of the said properties is handed over to the decree holder as the absolute owner thereof on the date of the adjustment. She declares that she is not keeping any right or claim over the said properties.

It has been agreed between the parties to the adjustment that the decree holder has been the absolute owner of Deesa Municipal Nos.679, 680, 682 and 684, but the decree holder will not take possession of the said houses and she would be in possession continued till she is alive and she would take the rent thereof for her life and the income of the said properties would be utilized by her for her maintenance and the decree holder would have no right or interest over the rental and other income from the said properties til the judgment debtor Kantaben is alive.

It has been agreed between the parties to the adjustment that after the death of judgment debtor (the appellant's mother) the decree holder would have to take possession of all the aforesaid properties and he would be entitled to recover the possession thereof with the aid of the Court pursuant to the decree for possession which is sought to be adjusted between the parties. It has also been agreed between the parties to the adjustment that the decree holder would be entitled to deal with the said properties as he liked.

It has finally been agreed between the parties that the cost of the suit as stated in the decree would not be recovered by the decree holder from the judgment debtor and the said amount of cost was being forgone."

5. The aforesaid adjustment was recorded by the Court

in Special Execution Application No. 3/73 and the execution proceedings were accordingly disposed of by an order dated October 13, 1976. Upon the death of Kantaben on July 22, 1992, the respondent filed Special Execution Application No. 7/92 against the present appellant as well as her husband for executing the decree for possession of suit properties passed in Special Civil Suit No.4 of 1962 which was confirmed by the High Court as according to the respondent the appellant being the daughter of deceased Kantaben, had come to reside with her in one of the properties and was in possession of the properties. In the Execution Application, the appellant and her husband were described as legal representatives of Kantaben. On notice being served,the appellant filed objections to the Execution Application asserting her own right in the properties as recognised by the High Court and pleaded to dismiss the same. The Executing Court noted that the appellant had raised objections with regard to her share in the properties but she was not justified in raising that objection in the execution of the decree passed against her mother. The Executing Court, therefore, overruled the objections raised by the appellant and passed an order dated April 22, 1997 directly to proceed further in terms of Order 21 Rule 37 of the Code of Civil Procedure. We may note that order 21 Rule 37 CPC confers discretionary power on the executing court to permit judgment debtor to show cause against detention in prison where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment debtor who is liable to be arrested in pursuance of the application. There was no decree for the payment of money in favour of the respondent nor the application was filed for execution of money decree. Therefore, we fail to understand as to how direction could have been given to proceed further with the application in terms of Order 21 Rule 37 C.P.C. Instead, direction to issue warrant for possession of the suit properties as contemplated by O.21 R.35 C.P.C. ought to have been granted. However, the fact remains that no attempt was made by the respondent to get the said error rectified and on record of the case there is no warrant for possession of suit properties against the present appellant. It may also be stated that objections filed by the appellant were treated as resistance offered by her to the execution of the decree as provided under Order-21 Rule 97 of the Code and as they were overruled, order passed by the Executing Court had the force of a decree in view of provisions of Order-21 Rule-103 of the Code. Therefore, that order was subjected to challenge before the High Court in First Appeal No.1523/98, which was instituted under section 96

of the Code of Civil Procedure. The learned Single Judge has dismissed the appeal by decree dated December 15, 1997, which has given rise to the present appeal.

6. Mr. D.K.Acharya, learned Counsel for the appellant urged that decree for possession in favour of the respondent was confirmed by the High Court in First Appeal No. 417/63 subject to the share of the appellant in the joint family properties and as the appellant was one of the joint owners of the properties, decree for possession passed against deceased Kantaben could not have been executed against the appellant without partition of joint properties. According to the learned Counsel the properties were never divided and as every joint owner of the properties is entitled to joint possession of the properties with others, decree for possession passed against deceased Kantaben could not have been executed against the appellant. The learned Counsel for the appellant stressed that neither the present appellant nor the three daughters of deceased Cheldas were parties either to Special Civil Suit No. 4/62, or First Appeal No. 417/63 or Special Execution Application No. 3/73 and the decree for possession passed against deceased Kantaben being not binding on the appellant, could not have been executed against the appellant, who has as per the finding of the High Court, 1/5th share in the properties which were belonging to Kashiben. What was emphasised was that the appellant does not represent the estate of deceased Kantaben, nor any estate of deceased Kantaben had devolved on her death, on the appellant and, therefore, execution application against the appellant and her husband could not have been instituted on the footing that they were legal representatives of deceased Kantaben. The learned Counsel for the appellant pleaded that adjustment of decree made between the respondent and deceased Kantaben would not affect the right of the appellant in the joint family properties and on the basis of the said adjustment, the respondent was not entitled to execute the decree against the appellant. According to the learned Counsel, Executing Court as well as the learned Single Judge of this Court who dismissed the appeal, lost sight of the important fact that the appellant being one of the joint owners of the properties, was entitled to, in her own right, joint possession and enjoyment of joint family properties till shares were specified and, therefore, the impugned decree should be set aside.

7. Miss K.M.Shah, learned Counsel for the respondent submitted that the Executing Court as well as the learned Single Judge of this Court have rightly construed the

decree passed by the Trial Court in Special Civil Suit No.4/62 as modified by the High Court in First Appeal No. 417/63 and, therefore, the appeal should not be accepted. According to the learned Counsel, in view of specific finding recorded by the High Court to the effect that Kantaben had no right to remain in possession of the properties, except the right of maintenance and residence for herself and for her daughter, i.e. the appellant, the respondent was entitled to execute the decree for possession against the appellant which was confirmed by the High Court. What was asserted on behalf of the respondent was that the appellant had the only right of maintenance and residence in joint family properties and as the appellant is the legal representative of deceased Kantaben,the respondent was entitled to execute the decree for possession which was passed against deceased Kantaben. It was pleaded that in view of the finding recorded by the High Court in First Appeal No. 417/63, the appellant had 1/5th share in 1/2 share of Bai Kashi and, therefore, it was for her to file a suit for partition, but she was not entitled to protect her possession of house bearing Municipal Census No.684 in execution proceedings. The learned Counsel submitted that the appellant is in possession of all the houses and the respondent being one of the joint owners cannot be excluded by her from enjoying the properties and, therefore, the appeal should be dismissed. It was also brought to the notice of the Court that house bearing No.685 of village Rajput in Deesa Taluka was gifted by the respondent to the appellant by a deed dated July 17, 1977; whereas three daughters of deceased Cheldas have filed affidavits relinguishing their share in the properties and in view of this settlement arrived at between the parties, the respondent was entitled to execute decree for possession which was passed against deceased Kantaben. It was also argued that possession of the appellant of the properties and more particularly the property in which the judgment debtor i.e. deceased Kantaben was residing is in capacity of legal representative of the judgment debtor and the appellant would accordingly be bound by the decree for possession passed against deceased Kantaben. Lastly, it was urged that the appellant will have to resort to the remedy of filing suit for partition in which case the appellant will have to offer property gifted to her for being treated as one of the properties available for the partition and as all the objections raised by the appellant are duly decided by the Executing Court as well as by the learned Single Judge of this Court, the appeal should not be accepted.

8. We have heard the learned Counsel for the parties and taken into consideration the documents forming part of the record of the case. Though the respondent had filed Special Civil Suit No. 4/62 claiming possession of the properties on the ground that he was the absolute owner thereof, the Division Bench has categorically held that the respondent was not the absolute owner of the suit properties. The Division Bench took into consideration the relevant dates as well as provisions of the Hindu Women's Right to Properties Act, 1937 and section 14 of the Hindu Succession Act, 1955, and has held that widow's interest of Bai Kashi had enlarged into full ownership right and she was absolute owner of the properties which were in her possession. After holding that Bai Kashi had 1/2 interest in the joint family properties, a clear finding was recorded by the Division Bench to the effect that the present appellant was also entitled to 1/5th share in 1/2 share of Bai Kashi. Admittedly, as on today, partition of the properties has not taken place by metes and bounds and the appellant continues to be one of the joint owners of the properties. So far as principle of law about the undivided share of a co-owner is concerned, it is well settled that till partition each member has got ownership extending over the entire properties conjointly with the rest and as a result of such co-ownership the possession is common. There is community of interest as well as unity of possession. Till a partition by metes and bounds takes place, no joint owner can say which is his one half or one third or one fifth share in the properties. In other words none of the joint owners can say that such and such property will fall to his share. Each joint owner is in possession of the properties, even if he has no actual possession, as possession of one is possession of all. No one can claim any exclusive possession of property unless agreed upon by joint owners. As the appellant has unspecified 1/5th share in 1/2 share of deceased Kashiben in the joint family properties, she is entitled to possessio of the properties in her own right. It is relevant to note that the appellant is claiming any share in the properties through her deceased mother and her right in the suit properties is independently recognised by the Division Bench of this Court in First Appeal no. 417/63. Neither the appellant, nor three daughters of deceased Cheldas were impleaded as parties in Special Civil Suit No. 4/62 which was instituted by by the respondent in the Court of learned Civil Judge (S.D.), Palanpur for possession of the suit properties against Kantaben. The appellant was not impleaded as one of the parties even in First Appeal No.4/62 or Special Execution Application No.3/73. By the so-called adjustment,

deceased Kantaben could not have affected the right of the appellant in the joint family properties which is recognised by the Division Bench of this Court, nor it was intended between the parties that the right of the appellant in the joint family properties would be affected in any manner by the said adjustment. Moreover, the suit properties were ancestral in the hands of deceased Cheldas. Therefore, Kantaben - who was widow of pre deceased son of Cheldas had right of maintenance and residence for herself and as well as for her daughter, who is present appellant, against the joint family properties. This right had nothing to do with the right in the properties which accrued to the appellant on death of Bai Kashi because Bai Kashi's interest in the properties had enlarged into full ownership right and she was absolute owner of the properties which were in her possession in view of the provisions of Section 14 of the Hindu Succession Act, 1956. The finding therefore that Kantaben had right of maintenance and residence for herself and for her daughter cannot be construed in any manner to limit independent right of the appellant in the suit properties. The finding recorded by the High Court in First Appeal No. 417/63 that Kantaben had no right to remain in possession of the properties, except a right of maintenance and residence for herself and for her daughter, cannot be construed to mean that earlier finding recorded by the High Court to the effect that the appellant has 1/5th share in 1/2 share of Bai Kashi, is set aside or obliterated in any manner. This finding has to be viewed in light of another important finding which was recorded by the High Court to the effect that Kantaben had no right to remain in possession of the properties. In our view, the appellant is entitled to joint possession of the properties with the respondent, more particularly having regard to the finding of the High Court to the effect that the appellant has 1/5th share in 1/2 share of Bai Kashi. Therefore, under the guise of execution of decree for possession passed against deceased Kantaben, the appellant who has her independent right, cannot be deprived of possession and enjoyment of joint family properties. It is relevant to notice that in the objections which were filed by the appellant against execution application it was clearly asserted by her that she is in possession of the properties in her own right and not as legal representative of deceased Kantaben. The record does not show that the present appellant is claiming any right in suit properties through Kantaben or that any interest of deceased Kantaben has devolved on the appellant. Therefore, we are of the confirmed opinion that the respondent could not have filed an application for

execution of decree passed in Special Civil Suit No.4/62 as modified by the High Court in First Appeal No.417/63 against the appellant and her husband on the ground that they were legal representatives of deceased Kantaben. If the respondent was of the opinion that the appellant had limited 1/5th share in the properties belonging to Bai Kashi and that she was not entitled to be in possession of all the properties, it was for him to file a suit for partition and obtain appropriate decree, but without obtaining any decree for partition, the right of the appellant cannot be permitted to be defeated while executing decree for possession which was passed against Kantaben. Moreover, it is not the case of the respondent that in Special Civil Suit No.4/62 any relief of partition was claimed by him. The suit was suit for possession simpliciter and the same was decreed because it was found that Kantaben had no title to the suit properties. That fact by itself, in our opinion, would not adversely affect the right of the appellant as recognised by the Division Bench of this Court in First Appeal No. 417/63 and the execution application against the appellant was liable to be dismissed. It is relevant to notice that the respondent has not filed any suit against the appellant making a grievance that he is being excluded from possession and enjoyment of joint properties illegally by the appellant. However, under the pretext of execution of decree for possession passed against deceased Kantaben, the respondent claims exclusive possession of properties without obtaining decree for partition of joint properties. Such a course is not permissible under the law and the respondent cannot be permitted to have exclusive possession of the properties under the guise of decree for possession passed against the deceased Kantaben who had no title worth the name to any of the joint properties.

9. The submission that gift of house bearing No.685 of village Rajpur in Deesa Taluka by the respondent to the appellant vide Deed dated July 17, 1977 as well as filing of the affidavits by three daughters of deceased Cheldas would indicate that there was compromise or adjustment between the parties regarding suit properties and, therefore, the respondent was entitled to execute decree against the appellant in respect of property bearing No.684 of village Rajpur in Deesa Taluka, has no substance. There is no writing on the record of the case which indicates that the appellant has relinguished her share in the house property bearing No.684 of village Rajpur in Deesa Taluka. The gift deed does not mention that because of gift of house property bearing no.685 of village Rajpur, the appellant would lose her right in the

property bearing No.684 of village Rajpur. Therefore, gift deed dated July 17, 1977 in no manner affects the right of the appellant as recognised by the High Court and it would not be correct to say that in view of the gift deed, the respondent was justified in filing execution application against the appellant and her husband for executing decree for possession of suit properties which was passed against Kantaben.

On overall view of the matter, we are satisfied that the executing court as well as the learned Single Judge of this Court has committed error of law in not considering the effect of finding recorded by the High Court that the appellant has 1/5th share in 1/2 share of Bai Kashi. Moreover, the well settled principle of law about undivided share of a joint owner was not brought to the notice of the learned Single Judge and therefore a view was taken that execution application was maintainable against the appellant. In our view, the obvious mistake came to be committed because of the finding recorded by the Division Bench to the effect that Kantaben had no right to remain in possession of the properties, except the right of maintenance and residence for herself and for her daughter. The other equally important finding viz. the appellant has 1/5th share in 1/2 share of Bai Kashi was not given its due importance, nor the principle that every joint holder of the property is entitled to joint possession and enjoyment of properties till properties are divided by metes and bounds was considered. Moreover, the fact that the appellant was not claiming through Kantaben was also lost sight of and, therefore, the impugned judgment came to be rendered. For all these reasons, in our view, the execution application against the appellant and her husband itself was not maintainable and, therefore, the impugned judgment is liable to be set aside and quashed.

For the foregoing reasons, the appeal succeeds. The judgment and decree dated December 15, 1997 rendered by the learned Single Judge in First Appeal No. 1523/97 is set aside and quashed. The order dated April 27, 1992 passed by the learned Civil Judge (S.D.), Palanpur below Exh.1 in Special Execution Application No. 7/92 is also set aside and quashed. The resultant effect is that Special Execution Application No. 7/92 also stands dismissed. The appeal is accordingly, allowed with no order as to costs.

(J.M.Panchal,J.)

20.4.2000 (A.M.Kapadia,J.)

(patel)
(kailash)